No. 15,510

IN THE

United States Court of Appeals

For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska, Division Number One.

REPLY BRIEF OF APPELLANTS.

FAULKNER, BANFIELD & BOOCHEVER,
JOHN H. DIMOND,
H. L. FAULKNER,
P. O. Box 1121, Juneau, Alaska,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

No. 15,510

IN THE

United States Court of Appeals

For the Ninth Circuit

FIDALGO ISLAND PACKING COMPANY, a Corporation, and CLARA WILSON, Intervenor,
Appellants,

vs.

A. B. PHILLIPS, Executive Director, Employment Security Commission of Alaska,
Appellee.

Appeal from the District Court for the District of Alaska, Division Number One.

REPLY BRIEF OF APPELLANTS.

I.

SUBSTITUTION OF PARTY DEFENDANT.

This is not properly before this Court. There was no cross appeal. It is foreclosed by the mandate. The question was raised for the first time in the District Court on the rehearing on the application for reinstatement of the judgment on the mandate with modifications. The only references to it in the record are

defendant's motion of February 28, 1957 (R. 27) and the court's order of denial (R. 32-3).

Furthermore, the judgment and decree in this case are binding on A. B. Phillips, *"present Director of the Employment Security Commission of Alaska, and his agents, officers, employees, and his and their successors in office"* (R. 66, Case No. 14505; emphasis ours) and Rule 65(d) F.R.C.P. makes the injunction binding, not only on the parties to the suit, but upon "their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

The Commission and whoever may have been the executive director from time to time have recognized this by continuing the litigation by their appeals and contesting every step.

The action is not a personal one, but was brough against, one, McLaughlin as "Executive Director, Em ployment Security Commission of Alaska." It did no abate every time the name and person of that directo changed for the judgment is binding on all. (See Rul 65(d), F.R.C.P. and R. p. 66, Cause No. 14505.)

The real party defendant has always been the same As was said in the decision of the U.S. Court o Appeals for the 8th Circuit, in *Fleming v. Goodwi* (165 Fed. 2d 334, at 338):

> "To hold that the action abated upon the resigna tion of Chester Bowles as Price Administrato and was no longer maintainable because of th noncompliance by his successor with Rule 25(d)

would, in our opinion, be to glorify form over substance."

II.

ORIGINAL JUDGMENT ON MANDATE OF AUGUST 13, 1956.

The fact that the original judgment on the mandate of August 13, 1956, makes no mention of interest or attorneys' fees is immaterial. Appellee's contention that this foreclosed the plaintiff and intervenor runs counter to the two decisions of the U.S. Supreme Court in *Ticonic National Bank v. Sprague* (303 U.S. 406), and *Sprague v. Ticonic National Bank,* 307 U.S. 161.

When this Court's mandate was entered on July 3, 1956, the District Court bench was vacant at Juneau. After the mandate was received, the attorney for appellee stated that he did not intend to apply for certiorari but requested that no judgment be entered until his associate should arrive in Juneau from the east. When he arrived he announced that he would apply for certiorari. Appellants felt that the matter of attorneys' fees could be better determined following the final disposition of the case as was done in the *Sprague* case. Aside from that, however, Rule 60(b)-6 sanctions the procedure we followed. We quote from *Sprague v. Ticonic National Bank,* 307 U.S. 161 at 168:

> "Certainly the claim for 'as between solicitor and client' costs was not directly in issue in the original proceedings by Sprague. It was neither before

> the Circuit Court of Appeals nor before this court. Its disposition, therefore, by the mandate of either court could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. *These implications are repelled by the basis on which such costs are granted.* They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, *the final disposition of which in its entire process including appeal, place such a claim in much better perspective than it would have at an earlier stage.*" (Emphasis supplied.)

And again at page 168:

> "While a mandate is controlling as to matters within its compass, on the remand a lower Court is free as to other issues. . . ."

At page 169:

> "The whole proceeding is a collateral one having a distinct and independent character."

Therefore we feel that appellants here were free to await the final disposition of this case by the Supreme Court and then to ask for interest and attorneys' fees in the same suit either under Rule 60(b) or on the authority of the *Sprague* cases.

It is true as appellee says that we did not ask for interest in the original suit. We did ask for costs and attorneys' fees, but did not specify there that we claimed attorneys' fees and expenses "as between solicitor and client." The trial Court did not, at the time

the decree was entered on May 12, as counsel says, deny costs and attorneys' fees. The Court at that time did not have the matter before it. No cost bill was filed. Our total taxable costs at that time were only $15.00, and we could not estimate an attorney's fee, or the amount of expense that would be involved, until the conclusion of the litigation. There was never any waiver in the whole proceedings.

It does not appear in the first case of *Ticonic National Bank v. Sprague* (303 U.S. 406) whether plaintiff had asked for interest in her complaint. It does not appear in the decisions of the lower Courts in that case, namely, 14 Fed. Supp. 900 and 87 Fed. 2d 365 and 90 Fed. 2d 641. Whether she did or did not would not seem to us to prevent its allowance by a court of equity.

Furthermore, as pointed out in our opening brief at page 11, the Commission received interest on the impounded funds, and those funds to the amount of $509,000 belonged to claimants. It would seem that a Federal Court of Equity would have the same power, on the final disposition of the case, to allow interest, as it had to allow attorneys' fees.

III.

APPLICABILITY OF SEC. 763, CH. 5, EX. SESSION LAWS, 1955.

Counsel for appellee in Sec. IV-1-a of their brief stress the language of Sec. 763, Ch. 5 Ex. Session Laws, 1955, and contend in effect that its provisions

forbid the application of the "salvage doctrine" in this case. In addition to what we have said in our opening brief, we respectfully submit the following:

Even if Sec. 763 does prohibit assignment of claims for debts, and the allowance of attorneys' fees and expenses under the salvage doctrine is considered assignment of a debt and within the prohibition, that would not affect the power of a Court of Equity to allow the fee as between attorney and client, or plaintiff and claimants; and the statute, so far as it may attempt any such interference, is void.

As argued in our opening brief, we do not think Sec. 763 is susceptible to appellee's interpretation; but for the sake of argument, let us assume it is, then it is in contravention of that provision of Sec. 3 of the Alaska Organic Act (ACLA 1949, 37 Stat. 512), which reads:

> "And the legislature shall pass no law depriving the judges and officers of the district court of any authority, jurisdiction or function exercised by like judges or officers of district courts of the United States."

The Supreme Court of the United States held in *U.S. v. Wigger* (235 U.S. 276, 59 Law. Ed. 226) that laws affecting the jurisdiction of the Courts of Alaska come within the category of laws which can be amended or repealed only by Congress and not by the legislature of Alaska.

Equity suits in Federal Courts are regulated exclusively by Federal law and decisions and are not affected by State statutes.

It was held by the Supreme Court in *U.S. ex rel. Louisiana v. Boarman* (244 U.S. 397, at 403):

> "This claim cannot be seriously entertained in the face of the long time perfectly settled law that equity suits in Federal Court and the Appellate procedure in them are regulated exclusively by Federal Statutes and decisions, unaffected by statutes of the States. Textbook citations will suffice: Street Fed. Eq. Pro. Secs. 97 and 98; Simkins Fed. Eq. Suit. Ch. 1."

And again in *Pusey, Jones Co. v. Hanssen* (261 U.S. 491 at 497):

> "That a remedial right to proceed in a Federal Court sitting in equity cannot be enlarged by State Statute is likewise clear. (Citing cases.) Nor can it be so narrowed."

We find the following in *Guffy v. Smith* (237 U.S. 101, 114):

> "By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal Courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation on those courts wherever sitting. (Citing cases.) As was said in the first of these cases: 'Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the Courts of the United States, and for this Court, in the last resort, to decide what those principles are, and to apply such of them to each

particular case, as they may find justly applicable.' "

IV.

CONCLUSION.

In the concluding pages of their brief, counsel argue in effect that if attorneys' fees are allowed to be paid as ordered by Judge Kelly in his opinion of January 21, 1957, and deducted from the claims of the beneficiaries of this litigation, the Secretary of Labor may not agree with the Court and therefore may declare the Alaska Act to be out of conformity with the Federal Act. Such an argument was made before Judge Kelly on the petition for rehearing.

This argument seems to us to be entirely out of place in any Court. Aside from that, the argument is absurd. One can hardly imagine the Secretary setting himself up as a court of last resort and assuming to hold a whip hand over the District Court and this Court.

If there is anything wrong with the statute of Alaska, that is for the consideration of the legislature.

Dated, June 19, 1957.

Respectfully submitted,
FAULKNER, BANFIELD & BOOCHEVER,
JOHN H. DIMOND,
H. L. FAULKNER,
By H. L. FAULKNER,
Attorneys for Appellants.